IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1378

JAPAN LINE, LTD.; KAWASAKI KISEN KAISHA, LTD.; MITSUI O.S.K. LINES, LTD.; NIPPON YUSEN KAISHA; SHOWA LINE, LTD.; and YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,

Appellants,

v.

COUNTY OF LOS ANGELES; CITY OF LOS ANGELES; and CITY OF LONG BEACH,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS APPEAL OR AFFIRM THE JUDGMENT BELOW

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The arguments presented by the Appellees, in the hope of avoiding review of the instant case by this Court, do not in any manner diminish the importance of the Federal questions presented herein. Appellees' Motion to Dismiss Appeal or Affirm the Judgment Below (hereinafter referred to as the "Appellees' Motion") should be denied on the ground that substantial Federal questions are presented for review by this Court as more specifically described in Appellants' Jurisdictional Statement. Moreover,

Appellees' Motion must be denied on the additional grounds that:

1. This case is properly before the Court on appeal pursuant to 28 U.S.C. 1257(2);
2. The decision of the Supreme Court of the State of California is erroneous as a matter of law and, at least with respect to the "home port" doctrine, is likely to result in forum shopping between Federal and state courts within the State of California; and
3. The imposition of any state or local tax is subject to, and must be consistent with, the Commerce Clause of the United States Constitution and treaties which the United States has entered into.

Lastly, the issues in this case should be reviewed due to the fact that it presents an opportunity for clarification of the extent to which the Court's recent decision in *Department of Revenue* v. *Association of Washington Stevedoring Companies,* 46 U.S.L.W. 4363 (April 26, 1978) applies to foreign commerce in those circumstances where there exists: (i) the burden of double, and possibly multiple, taxation; and (ii) the prospect of the imposition of retaliatory taxes against U.S.-owned shipping companies and other carriers.

ARGUMENT

I.

An appeal is appropriate in this case.

It is argued in Appellees' Motion that this case should not be heard by the Court pursuant to the appeal procedure as set forth in 28 U.S.C. §1257(2). Rather, Appellees contend that Appellants should have proceeded by way of *certiorari* pursuant to 28 U.S.C. §1257(3). Appellees' unsupported argument is in error.

The question in the instant case concerns the validity of the tax imposed by Appellees under the Constitution of the United States (hereinafter referred to as the "Constitution") and various treaties. The questions involved in this case were set forth by the Supreme Court of the State of California as follows:

> "The sole question presented by this appeal upon an agreed statement from a tax refund judgment is whether appellants, the County of Los Angeles and the City of Los Angeles, may impose an apportioned ad valorem tax upon cargo shipping containers, taxed in Japan, used here essentially exclusively in foreign commerce and owned and controlled by Japanese taxpayers."
>
> 141 Cal. Rptr. 905 at 907.

> "The initial position of the taxpayers on this appeal was that under both the home-port doctrine and the most favored nation provisions of the 1953 treaty between the United States and Japan their containers are not subject to taxation by any jurisdiction except Japan . . ."
>
> 141 Cal. Rptr. 905 at 907.

". . . They there argued that the property taxes at issue constitute indirect tonnage duties prohibited by Article I, section 10, clause 3 of the United States Constitution and, in support of one of their initial contentions that these taxes are also prohibited by applicable treaties . . ."

141 Cal. Rptr. 905 at 908.

In rendering its decision, the Supreme Court of the State of California made a number of statements, which establish that clearly it considered the repugnance of the tax in relation to the Constitution, including the following:

"Sea-Land is fully dispositive of the commerce and Federal exclusivity issues raised in the case at bench."

141 Cal. Rptr. 905 at 909.

"The taxpayers contend that this prohibition invalidates the local property taxes at issue since they in practical effect are tonnage duties upon the cargo containers."

141 Cal. Rptr. 905 at 909.

"The taxpayers contend that the local taxation at issue violates certain treaty obligations of the United States and is therefore invalid under the supremacy clause of the United States Constitution . . ."

141 Cal. Rptr. 905 at 910.

The arguments raised by the Appellants in the courts below are sufficient to invoke the jurisdiction of this Court pursuant to the appeal procedure. For purposes of invoking the Court's jurisdiction pursuant to 28 U.S.C. §1257(2), it is necessary merely to have argued below that the property tax cannot be imposed consistently with the Constitution, treaties or Federal law. *American Oil Co.* v. *Neill*, 380 U.S. 451 (1965); *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685 (1965); *Railway Express Agency* v. *Virginia*, 347 U.S. 359 (1954).

In view of the foregoing, Appellees' contention must be rejected. If, however, an appeal is not deemed to be the proper mode of requesting jurisdiction, Appellants respectfully request that this appeal be considered as a petition for *certiorari*.

II.

The California Supreme Court erroneously concluded that the home port doctrine is not applicable.

Appellees have insisted, throughout this proceeding, that the "home port" doctrine is not applicable to property used in foreign commerce. This conclusion has been supported on the basis of this Court's decisions regarding interstate commerce and the decision in *Canadian Pacific Railroad* v. *King County*, 90 Wash. 38, 155 P.2d 416 (1916).

There is no question that the "home port" doctrine retains its vitality. In fact, at least one court within the State of California has noted that the "home port" doctrine is valid as applied to foreign commerce. It is ironic that in *Continental Dredging Company* v. *County of Los Angeles*, 366 F. Supp. 1133 (D.C. Cal. 1973), a case in which Appellees' counsel both participated, the Federal District Court for the Central District of California observed that:

"The home-port rule originally provided that the taxable situs of ocean-going vessels was exclusively within the domicile of the owners thereof and the place of registration. *Hays* v. *Pacific Mail Steamship Co.*, 58

U.S. 596, 17 How. 596, 15 L.Ed. 254 (1854). *Hays* involved ships in interstate commerce but the rule stated in *Hays* applies to foreign commerce as well. Subsequent decisions have eroded the rule with respect to interstate commerce only, now providing for local taxation on an apportioned basis in many circumstances. See dicta in *Scandinavian Airlines* v. *County of Los Angeles,* 56 Cal.2d 11, 14 Cal.Rptr. 25, at 29-34, 363 P.2d 25 (1961), where the Court held that a two-day stopover was insufficient to alter foreign situs. *Although the theories supporting the home-port rule have shifted over the years (see Scandinavian, supra, at 32, 363 P.2d 25, commerce clause, due process clause, supremacy clause), the rule itself with respect to foreign commerce remains intact.*

(Emphasis added.) 366 F.Supp. at 1139.

The decision in *Continental Dredging Company* underscores the need for review of the instant case. It is clear that, under the authority of *Continental Dredging Company,* potential litigants are likely to have a distinct advantage in the Federal courts which have not ascribed to the unwarranted extension of property tax jurisdiction in the State of California. The continuance of such a dichotomy could well lead to "forum shopping." Therefore, this case presents a substantial Federal question which should be reviewed by the Court.

III.

A limitation on the imposition of tax upon instrumentalities of foreign commerce does not constitute unwarranted limitation of state taxation.

Appellees argue that under the Constitution the states have the uncontrolled right to raise revenues for their own needs. In support of this proposition, Appellees cite the Federalist Papers, No. 32. It is submitted that Appellees have misconstrued the rights of state governments to impose taxes upon foreign commerce and Appellants' arguments in relation thereto.

The cited portion of the Federalist Papers relied upon by Appellees does not address itself to the proper relationship between foreign commerce and the rights of state governments to impose a tax. Clearly, if there is any conflict between foreign commerce and the states' rights to impose a tax, the policies in favor of foreign commerce should prevail. The policy considerations to be applied in the case of foreign commerce are intrinsically more important than in the case of interstate commerce since they concern the nation as a whole in relation to foreign governments. Federalist Papers, No. 42 (Madison). *See, also,* Abel, *The Commerce Clause in the Constitutional Convention in Contemporary Comment,* 25 Minn. L.Rev. 432, 465 (1941). Thus, insofar as concerns foreign commerce, the states' rights to impose a tax is clearly secondary to the policies underlying free flow of commerce.

Appellees argue that the framers of the Constitution did not intend to regulate or prohibit any state taxes under the Commerce Clause. According to the Appellees, the impact of state and local taxation is a matter of local governmental discretion, notwithstanding the effect it may have upon the

relations of the United States with foreign nations. However, as explained by Chief Justice Marshall, the status of states within the realm of foreign commerce is as follows:

> "The states are unknown to foreign nations; their sovereignty exists only with relation to each other and to the general government, whatever regulations foreign commerce should be subjected to in the parts of the Union, the general government would be held responsible for them; and all other regulations but those which the Congress had imposed would be regarded by foreign nations as trespasses and violations of national faith and comity."
>
> *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 228 (1824).

The rationale of Chief Justice Marshall is directly applicable in the instant case. Appellees have, with the sanction of the Supreme Court of the State of California, elevated themselves in importance beyond the Federal government and asserted a position likely to create an impact and adverse ramifications beyond their own territorial limits. It should be noted that the State of Oregon, largely based upon the interpretation of the law enunciated by the Supreme Court of the State of California, has re-interpreted its own property tax law in a manner that would subject to tax foreign-owned containers used exclusively in foreign commerce. There is attached hereto as Exhibit A, a copy of an opinion dated January 31, 1978 of an Assistant Attorney General of the State of Oregon to this effect. Several of Appellants herein have been requested to file property tax returns by officials of Multnomah County, Oregon. This action clearly evidences the trend toward the proliferation of such taxes as referred to in Appellants' Jurisdictional Statement at p. 21. Therefore, this case

presents substantial Federal questions which must be reviewed by this Court.

IV.

This case presents important Federal questions which were not confronted in *Department of Revenue* v. *Association of Washington Stevedoring Companies*.

On April 26, 1978, this Court rendered its decision in *Department of Revenue* v. *Association of Washington Stevedoring Companies*, 46 U.S.L.W. 4363 (April 26, 1978), holding that a business and occupation tax imposed by the State of Washington with respect to stevedoring activities conducted entirely within the state is constitutional under the Commerce and Import-Export Clauses of the Constitution. The foregoing decision does not affect the question whether the instant case should be heard by the Court due to the fact that the tax imposed by Appellees: (i) conflicts with the purpose of the Import-Export clause to the extent that the taxes in the instant case constitute a restraint upon the Federal government in relation to foreign policy; (ii) disturb the harmonious relationship which exists between the states in relation to foreign commerce; and (iii) fails to effectuate a fair and just apportionment of taxes because, regardless of the manner in which the said tax is applied, Appellants have been subjected to double taxation.

The tax considered in *Association of Washington Stevedoring Companies* concerned business and occupation taxes imposed on the business of loading and unloading cargo ships, which activity was, in its entirety, conducted within the State of Washington. No foreign business or vessel was actually subjected to such tax. Based on these factors,

this Court held that the Commerce and Import-Export Clauses of the Constitution were not violated by the imposition of the tax.

The Court's decision with respect to the Commerce Clause was based upon three premises. First, the Court held that a tax imposed upon interstate commerce is not unconstitutional *per se*. In following the rationale established in *Complete Auto Transit Inc.* v. *Brady*, 430 U.S. 274 (1977), the Court held that the Commerce Clause does not relieve interstate commerce from its just share of state tax burdens. Second, the Court noted that the tax imposed by the State of Washington did not impose multiple tax burdens. Third, the Court reasoned that a state tax would be unconstitutional, pursuant to the Commerce Clause, only in an instance where the tax unfairly burdens commerce by exacting more than a fair share of tax upon the interstate activity. There was no suggestion in the facts brought before the Court, as well as in those brought before the lower courts, in the *Association of Washington Stevedoring Companies* case that the tax was not fairly related to services and protections provided by the state in relation to the activity conducted therein.

The facts in the instant case are in direct contrast with those in *Association of Washington Stevedoring Companies*. First, the instant case presents a situation wherein double tax burdens have resulted. As noted in the Appellants' Jurisdictional Statement, Appellants are foreign persons, the property of which is subject to full *ad valorem* property tax in Japan. Therefore, regardless of any allocation formula that may have been applied by Appellees, Appellants have been subject to a double tax burden. Second, the property taxes levied by Appellees do not bear a fair relation to the presence of the containers of Appellants within the jurisdiction of Appellees or the limited quantum of services or protection rendered by Appellees. The sole contact which Appellants' property maintains with such jurisdictions is limited to the passage of ocean-going shipping containers through such counties as an integral part of a shipment in foreign commerce. In this respect, the activity of Appellants is different from the activity conducted in *Association of Washington Stevedoring Companies*. In *Association of Washington Stevedoring Companies*, the activity involved was the rendering of local services on a continuous basis solely within the State of Washington. Third, as concerns the balancing of the needs of Appellees in relation to the activity of Appellants herein, it is submitted that the amount of tax imposed does not provide a fair relationship to the limited services and protections provided by the Appellees.

The Court also held, in the *Washington Stevedoring Companies* case, that the business and occupation tax involved therein did not contravene the policies of the Import-Export Clause. In reaching this conclusion, the Court summarized the purpose of the Import-Export Clause as enunciated in *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976) in the following terms:

> "The framers of the Constitution thus sought to alleviate three main concerns . . . the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the states consistently with that exclusive power; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony among the states might be disturbed unless seaboard states, with their crucial ports of entry, were prohibited from levying taxes on citizens of other states by taxing goods

merely flowing through their ports to the other states not situated as favorably geographically."

423 U.S. at 285-6.
(Footnotes omitted).

The imposition of a business and occupation tax was deemed to be consistent with the policies of the Import-Export Clause principally due to the nature of the activity involved. First, the Court noted that the tax involved did not restrain the ability of the Federal government to conduct foreign policy. In reaching its conclusion, the Court stated that:

"The assessments in this case are only upon business conducted entirely within Washington. No foreign business or vessel is taxed."

(Emphasis added.)
46 U.S.L.W. at 4368.

Second, the Court held that the tax merely compensated the state for services and protection extended to the stevedoring business and the tax was not applied directly to the import of goods. Last, the Court held that the tax involved was applied to a taxpayer with a reasonable *nexus* to the state.

The considerations applied by the Court in *Association of Washington Stevedoring Companies* to sustain the validity of the tax under the Import-Export Clause must be reconsidered in view of the varied circumstances involved herein. First, Appellants are foreign entities, the principal places of business of which are located in Japan. The assessment is imposed upon an instrumentality of foreign commerce, which begins its voyage in a foreign country, such as Japan, and ends at some point in the United

States, or *vice versa*. In this connection, the assessment of tax in this case is upon businesses conducted exclusively in foreign commerce and almost in their entirety outside of the local jurisdiction that imposes the tax. The object of the tax is a foreign business and an instrumentality of foreign commerce. The United States Government has attempted to avoid the exaction of such taxes by means of the Customs Convention on Containers (20 U.S.T. 301, T.I.A.S. 6634), the General Agreement on Tariffs and Trade (61 Stat. [5], [6], T.I.A.S. 1700), and the Treaty of Friendship, Navigation and Commerce with Japan (4 U.S.T. 2063, T.I.A.S. 2863). Therefore, the imposition of a tax in this case constitutes an impediment upon the regulation of foreign trade by the United States.

As a second basis for holding that the Import-Export Clause was not violated as a result of the tax imposed in *Association of Washington Stevedoring Companies,* the Court noted that the object of the tax, the rendering of services, was somewhat attenuated from the imported goods themselves. In the instant case, the object of the tax is, in essence, the vessel that is carrying the goods or an integral part of such vessel. This Court clearly has stated in its decision in *Michelin* that property taxes imposed by coastal states could be avoided by importers through the use of such containers. 423 U.S. at 288-90. Therefore, the containers involved in this case are intrinsically interrelated with the goods involved to a much greater extent than were the stevedoring activities involved in the *Association of Washington Stevedoring Companies* case.

Moreover, the third consideration applied to the *Association of Washington Stevedoring Companies* case does not appear in the instant case. In the former case, it was clear that the taxpayer had a reasonable *nexus* with the

state imposing the tax. In the instant case, the only *nexus* between Appellants and the Appellees is that some of Appellants' containers pass through the territorial limits of Appellees and remain therein for transitory periods of time, such as several weeks, as an integral part of an uninterrupted shipment in foreign commerce. Moreover, the relationship between the tax imposed and the services actually rendered, in terms of police and fire protection as well as road construction and maintenance, is wholly disproportionate. Finally, it appears that the utilization of an "average presence" formula by Appellees is contrary to the provisions of Section 205, Title 18, California Administrative Code, which provides that before movable property will be considered to have a taxable *situs* in the taxing jurisdiction, such property must remain therein for a minimum period of time, a prerequisite which is not satisfied in the instant case. The same condition is imposed by the Customs Convention on Containers, 20 U.S.T. 301, T.I.A.S. 6634. Consequently, it is submitted that the property in question lacks a taxable *situs* within, and a reasonable relationship to, the territorial limits of Appellees.

Moreover, it should be noted that *Association of Washington Stevedoring Companies* did not present any questions concerning the Tonnage Duties Clause of the Constitution. The taxes in the instant case fall particularly within the prohibition established in the Tonnage Duties Clause inasmuch as an instrumentality of commerce is involved.

For the above mentioned reasons, this case presents a number of substantial Federal issues that were not considered in *Association of Washington Stevedoring Companies* and should be reviewed by the Court.

CONCLUSION

In view of the foregoing, Appellees' Motion should be denied and probable jurisdiction should be noted in order that plenary consideration, on the basis of briefs and oral argument, may be given to the questions presented herein.

Respectfully submitted,

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Exhibit A

DEPARTMENT OF JUSTICE
TAX DIVISION
104 State Office Building
Salem, Oregon 97320
Telephone: (803) 376-4494

January 31, 1978

Mr. Lindy Freeman
Division of Assessment & Taxation
Room 136
Multnomah County Courthouse
Portland, Oregon 97204

Re: Personal Property Tax on Cargo Containers

Dear Mr. Freeman:

This opinion is in response to a question presented by your office concerning cargo containers.

QUESTION PRESENTED

Are cargo containers used in interstate and foreign commerce subject to personal property ad valorem tax assessment?

ANSWER GIVEN

Cargo containers continuously present in Multnomah County are not constitutionally immune from an apportioned personal property ad valorem tax. Neither do these cargo containers qualify for exemption under Oregon's freeport law, ORS 307.810.

Exhibit A

DISCUSSION

You have asked whether cargo containers used on container ships in interstate and foreign commerce can be assessed under the personal property ad valorem tax. Taxpayers have claimed that these containers are either immune under the protection of the United States Constitution or are exempt under Oregon's free port law.

To support their position of constitutional immunity, taxpayers have cited a decision by the Superior Court of California. *Japan Line, Ltd.* v. *County of Los Angeles,* 132 Cal Rptr 531 (L.A. County 1973). However, the Supreme Court of California recently reversed this superior court's decision. *Japan Line, Ltd.* v. *County of Los Angeles,* 141 Cal 905 (1977). The California Supreme Court held that an apportioned ad valorem tax on the cargo containers violated neither the Commerce Clause, the Import-Export Clause nor the Supremacy Clause of the United States Constitution. A copy of this recent decision and a copy of an earlier decision in *Sea-Land Service, Inc.* v. *County of Alameda,* 117 Cal2d 448, 528 P2d 56 (1974) are enclosed. Assuming that the cargo containers' presence in Multnomah County are similar to those in the California counties, these two cases clearly indicate that the cargo containers are subject to the ad valorem tax.

The taxpayers also contend that their cargo containers are exempt from ad valorem taxation under the Oregon free port law. However, ORS 307.810 grants an exemption only for

> "Personal property in transit through this state [that] is goods, wares and merchandise destined for sale in the ordinary course of trade or business. . . ."

Exhibit A

The cargo containers are used to transport personal property destined for sale in the ordinary course of the trade or business, but are not, themselves, destined for sale out of state. The Oregon free-port law was not intended to extend to containers used and reused transporting goods.

The two enclosed California decisions clearly hold that cargo containers used in interstate and foreign commerce are not immune under the United States Constitution from an apportioned ad valorem tax. In addition, the Oregon free port law does not extend its exemption protection to the containers. Consequently, the continuous presence of cargo containers in Multnomah County subjects them to an apportioned ad valorem tax.

Sincerely,

/s/ JAMES D. MANARY
James D. Manary
Assistant Attorney General

bem

cc: Walt Taylor
Personal Property Assessment

RECEIVED
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